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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. .....

ATLANTIC COAST LINE RAILROAD COMPANY and the DEPOSIT COMMITTEE for First and Refunding Mortgage 5% Bonds of Florida East Coast Railway Company due 1974,

Petitioners.

vs.

ST. JOE PAPER COMPANY, ET AL.,

Respondents.

On Petition For a Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit.

BRIEF FOR THE RESPONDENT
St. Joe Paper Company, in Opposition

This petition seeks to vacate an order entered by the District Court for the Southern District of Florida (81 F. Supp., 926) and upheld by the Fifth Circuit Court of Appeals, (Unreported as yet), by which a plan of reorganization of the Florida East Coast Railway Company under Section 77, proposed and submitted by the Interstate Commerce Commission, was disapproved.

In brief, the Petitioners assert that the District Court's opinion proceeded upon an unwarranted application of the powers of the Court over a plan of reorganization certified to the Court by the Interstate Commerce Commission in proceedings under Section 77. They aver that such application conflicts with the decisions of this Court in *Ecker v. Western Pacific R. Co.*, 318 U. S. 448, and *Institutional Investors v. Chicago etc., R. Co.*, 318 U. S. 523.

SUMMARY OF PROCEEDINGS

The background of the proceedings, giving rise to this controversy, covers a long period of time and is not easily summarized.

(a) Description of the Debtor and its financial situation.

The debtor in reorganization, Florida East Coast Railway Company, owns and operates a railroad running from Jacksonville to Miami, both in Florida. It has always been independently owned and independently operated. Its line is double-tracked, has been recently re-railed and is in excellent condition. Its rolling stock is modern in every respect. Its management is experienced and capable. Such railroad, all parties concede, has been efficiently operated and has rendered adequate and satisfactory service under its independent management. Operating through one of the most populous areas of the United States, it has but one rail competitor, the Seaboard Air Line Railway Company. At its terminus in Jacksonville, it connects with the Atlantic Coast Line Railroad, the Southern Railway and the Seaboard.[1]

The financial setup of the debtor is comparatively simple. Ahead of its common stock are but two mortgage debts. The first—in the amount of $12,000,000—is embraced in an issue of four and one-half percent mortgage bonds; the second represents an issue of $45,000,000 five percent mortgage bonds. There is no controversy over priority of liens between the two bond issues. The first mortgage debt has

[1] The Commission said in discussing the efficiency of operations of the debtor and that likely under the disapproved merger (R., Vol. I, p. 321):

"As to the promotion of efficiency of transportation services generally by reason of improvements in the physical properties of the two carriers, the record does not furnish a basis for a conclusion that it would be materially affected whether the debtor's properties are operated independently or as a part of the Coast Line."

At page 322, Vol. I, R., the Commission quotes counsel for the Coast Line to this effect:

"Mr. Bourne (principal counsel for the Coast Line): We do not take the position, and have never taken the position, that the Florida East Coast is not an efficiently operated railroad today for an independent railroad. Our position is that a single-line operation of the two roads would be in the public interest."

See, also, R., Vol. I, pp. 425-6 and 321.

never been in default. Interest on the second mortgage debt went into default in the early thirties. Unpaid interest on such debt now amounts to about $35,000,000. See Appendix A, R., Vol. III, p. 660.

(b) Institution of receivership and reorganization proceedings of the debtor.

Shortly after initial default on the second mortgage debt, the railroad was placed in receivership. This receivership continued until 1941, when the present proceeding in bankruptcy was filed under Section 77 in the Federal Court for the Southern District of Florida. See Note 1, R., Vol. III, p. 529.

(c) Proceedings before the Interstate Commerce Commission.

Immediately upon the filing of this bankruptcy proceeding, a Deposit Committee for the First and Refunding five percent bonds, composed primarily of representatives of New York banks and national insurance companies, submitted a plan of reorganization of the debtor, which, in turn, was referred to the Interstate Commerce Commission for consideration. R., Vol. III, pp. 529-30, Vol. II, p. 321. This plan assumed that the permissible capitalization of the debtor was less than the amount of the two mortgage debts and that the real owners of the equity in the debtor were the First and Refunding bondholders. R., Vol. III, pp. 539-42. While such plan was under consideration by the Commission, the so-called duPont interests, represented here by the respondent, St. Joe Paper Company, submitted an alternative plan of reorganization, under which the first mortgage debt would have been undisturbed, the second mortgage creditors would have received for their interest new bonds and common stock of the reorganized debtor, and additional common stock would have been sold at par for cash to the duPont interests to secure new money to finance the needed improvements of the debtor's road. This additional common stock, to be sold for cash under the alternative plan, would have amounted to about fifty percent of the outstanding equity capital of the debtor. R., Vol. III, pp. 543-8.

This alternative plan of the duPont interests was vigorously assailed by the five percent committee because it would have involuntarily transferred control of the debtor from the First and Refunding bondholders—who were, it contended, the real owners of the equity in the debtor—to the duPont interests in violation of the constitutional and equitable rights of such bondholders. R., Vol. I, p. 439. Vol. III, pp. 550-1. In its First Report in this proceeding (filed April 6, 1942), the Interstate Commerce Commission unanimously upheld this position of the Committee that it would be alike illegal and inequitable to divest the First and Refunding bondholders of their right of control and their equity and disapproved the alternative plan. R., Vol. III, pp. 564, 578. Under the plan approved by the Commission at this time, the valuation or "permissible capitalization" of the debtor was fixed at approximately $37,000,000. R., Vol. III, p. 576. The first mortgage debt was not to be disturbed, though provision was made for the issuance of $6,000,000 additional fixed interest first mortgage bonds to finance improvements of debtor's line or a total of authorized fixed interest debt of $18,000,000. R., Vol. III, pp. 589-92. The First and Refunding bondholders were to receive all remaining capitalization, divided into income bonds and common stock. All unsecured indebtedness of and the stock in the debtor were found worthless. This plan, which recognized and gave effect to the ownership of the equity in the debtor by the First and Refunding bondholders, was certified to the District Court for approval.[3]

At this point in the proceeding, the duPont interests purchased from the banks and insurance companies, whose representatives composed the five percent committee, their bonds and thereby became the owner of a majority of the First and Refunding bonds. R., Vol. I, pp. 152-3. Since that time, the Committee has claimed the right to represent an insignificant number of bonds, the owners of which apparently are not readily available or had refused to follow

[3] In this Report, the Commission said that "we find that, within the recommended permissible capitalization and annual charges, the first and refunding mortgage bond-holders are entitled to the entire equity in the property remaining after satisfaction of prior indebtedness." R., Vol. III, p. 586.

the Committee's recommendation that they sell their bonds to the duPont interests. R., Vol. II, pp. 353-4.

Before this first plan of reorganization was submitted to the District Court, there was a substantial improvement in the financial condition of the debtor. The Court accordingly disapproved the plan and remanded the proceedings to the Commission. R., Vol. I, pp. 151-2.

When the Commission resumed its hearings upon this recommital, all parties agreed—including the Safe Deposit Trust Company which owns control of the Atlantic Coast Line—that duPont control was in the public interest. See R., Vol. I, pp. 153-4, 185, 347, 372; *Atlantic Coast Line R. Co. Purchase,* 261 I. C. C. 820. The only plan considered was one which provided for (1) the use of most of the available cash, accumulated from earnings of the debtor, to pay off in full the first mortgage debt and to defray about $8,000,000 in improvements, and (2) the distribution of the permissible capitalization of the debtor, consisting of bonded debt and stock of the reorganized debtor among the First and Refunding bondholders, whose debt exceeded considerably the "permissible capitalization" of the debtor. R., Vol I, p. 173. After the hearings on this new plan of reorganization had been concluded, S. A. Lynch, the owner of certain First and Refunding bonds—following negotiations with the Coast Line—filed a petition to reopen the hearing in order to permit the filing of an alternative plan under which control of the debtor would pass to the Coast Line. It was to permit the filing of a supporting brief to this petition of Lynch that the Coast Line was allowed to intervene. R., Vol. III, p. 747. Under this alternative plan, the debtor would have issued certain bonds and preferred stocks, all of which would have been received and held by the First and Refunding bondholders, and $6,000,000 par value common stock, of which the bondholders would have been obligated to sell $3,600,000—that is, control of the equity—to the Coast Line for cash at par. R., Vol. I, pp. 187-93. This was much the same proposal submitted by the duPont interests at the time of the consideration of the first plan of reorganization.

Again, this new attempt to take from the First and Refunding bondholders the control and ownership of the debtor was promptly rebuffed by the Commission, which said in its unanimous opinion (R., Vol. I, pp. 191-2):

> "The proponents of the Lynch plan contend that the sale at a price of $100 per share of 60 percent of the common stock allotted to the first and refunding bondholders would represent the full value of the stock based on the total capitalization provided for in the plan and that the owners of the stock therefore would receive full compensation for the surrender of their shares and would have no legal right to complain. We are not convinced by this argument. All the securities to be issued under the plan taken at par will fall far short of satisfying the amount of the claim of the first and refunding bondholders. If, in the view of such bondholders, the prospects of future earnings or the control value are such that the stock later may have a market value in excess of par, and they desire to hold the stock to realize the higher price, they should be at liberty to do so, as they would not be reimbursed in full on their claim by accepting $100 per share for stock representing a part of their share of the debtor's estate."

It will be noted that thus, in two separate and unanimous opinions—one entered in 1942 and the other in 1945—the Commission had found that it was both illegal and inequitable to transfer involuntarily—even for a consideration—the railroad away from the First and Refunding bondholders, that such bondholders were entitled to own and control the railroad and that they had the legal and equitable right to receive, without dilution through forced sale to any other interests, all future enhancement and appreciation in the value of the property.

After the filing of this Second Report of the Commission, the Coast Line, discarding Mr. Lynch and flanked by Senator Pepper appearing as "Senator from Florida," filed petitions with the Commission, asking that the proceedings be reopened to permit the consideration of a pro-

posal to transfer the debtor to another carrier, obviously the Coast Line. After an oral hearing, at which Senator Pepper and representatives of the Coast Line were heard, the proceedings were reopened. R., Vol. I, pp. 295, 729; Vol. III, pp. 776-8.

In preparing for the reopened hearings, the Coast Line purchased two unsecured debts held by the Flagler Estate, which in its prior reports the Commission had found worthless.[1] These claims were acquired by the Coast Line admittedly to give it standing to propose in its own behalf a plan of reorganization for the debtor. R., Vol. I, pp. 147-9. Accordingly, when the hearings were reopened, the Coast Line in its new role of an unsecured creditor of the debtor submitted a new plan of reorganization under which the debtor would be "merged" with the Coast Line. Such merger, it was asserted, would achieve substantial savings for both debtor and the Coast Line, estimated at about $1,000,000 per year; and it was this claim of savings through unification that was urged principally on behalf of the "merger".

This Coast Line plan of "merger" was bitterly opposed by (1) all the bondholders of the debtor appearing before the Commission and representing upwards of eighty percent of the outstanding First and Refunding bondholders, (2) the Railway Labor executives, (3) all connecting and competing rail carriers other than the Coast Line itself and (4) practically all the shippers to be served. The supporters of the merger were, of course, the Coast Line itself, Senator Pepper who appeared not as shipper, owner of bonds or representative of labor, but under the title of "Senator from Florida", and the moribund five

[1] The Commission said in this particular (R., Vol. I, p. 299):

"On October 18, 1945, shortly prior to the date upon which the Coast Line presented its plan, and about 3 weeks prior to the commencement of the reopened hearings, the Coast Line procured assignment to it of two claims on open account against the debtor, totalling $1,900.000, these claims being previously filed by Florida Coast Car Ferry Company and by the trustees under the will of Mary Flagler Bingham."

See, also, R., Vol. III, p. 747.

The Flagler Estate was the owner of all the common stock of the debtor. The validity of the unsecured debts of the debtor, acquired by its sole stockholder—especially as against other creditors—is open to serious doubt. *In re Loewer's Gambrinus Brewery Co.* (C.C.A.N.Y. 1948) 167 F., (2nd) 318.

percent committee, whose members had sold either for themselves or their own institutions all their bonds several years before and who were so disinterested that they have now only an "acting secretary." R., Vol. I, p. 352.

In connection with the hearings on this "merger" proposal, it was for the first time suggested in this proceeding that duPont or St. Joe Paper control of the debtor was against the public interest. R., Vol. I, p. 308. This suggestion did not come from shippers; it was not raised by the competitor carrier, the Seaboard; it was not charged by a bondholder. It was introduced by the Coast Line, which now sought to acquire the property away from its equitable owners, and by Senator Pepper. After a full hearing, the Examiner for the Commission, who took the testimony and observed the demeanor of the witnesses, filed his Report, reaffirming the previous determinations made unanimously by the Commission, including the determination that duPont control of the debtor was in the public interest.[4] Among other things, he found (R., Vol. III, pp 797-8):

> "The Commission should find and conclude that the Coast Line has not shown that its proposals for satisfaction of the claim of the debtor's first and refunding bondholders are fair and equitable and afford due recognition of the rights which they would

[4] This claim of incompatible public interest against duPont control was so tenuous that two previous unanimous decisions of the Commission had found duPont control actually in the public interest. Unlike the *Piedmont & Northern* proceedings (1928) 138 I. C. C. 363, referred to by the appellants at p. 10 of their brief, the objector is not the debtor's competitor, the Seaboard. In fact, the Seaboard sees improper monopoly extended in transferring the debtor to the Coast Line, thereby giving the latter complete control of the debtor's interchange at Jacksonville. Seaboard objects to Coast Line control; it welcomes duPont control. This is quite different from the Piedmont & Northern case, as we have said. See R., Vol. III, pp. 786-90. Moreover, the dominating stockholder of the Coast Line had previously taken the position in this proceeding that duPont control of the debtor was in the public interest. The suggestion that duPont estate owned a paper mill, together with a telephone line and small service railroad, located some three hundred miles from debtor's line hardly fits into the concept of the "commodities clause." It is true the duPont estate owns control of three banks located in cities served by the debtor's railroad and has two or three office buildings. This is a far cry from the situation required under the "commodities clause." Basically, the Coast Line rested its claim of incompatible public interest on the ground that the duPont Estate is a charitable trust which should not own control of a railroad. This argument overlooks the fact that the Coast Line itself is controlled by the Walters trust, which largely is a charitable trust. Such an argument would disqualify both duPont and Coast Line control.

be required to surrender, including the right to control and manage the reorganized company. While the Coast Line has stated that it will be prepared to give immediate consideration to any modification of the Coast Line plan or any other plan which the Commission may approve and which will provide for unification of the debtor with the Coast Line, the situation here involved as disclosed by the evidence, would not justify proposal by the Commission of a modified Coast Line plan which would have the effect of depriving the debtor's bondholders of their right to control the reorganized property and at the same time speculation as to whether its terms would be accepted by the Coast Line, such acceptance, being a necessary condition for the plan becoming effective. Particularly is this true if the Commission should find, as recommended herein, that a merger of the Coast Line with the debtor is not required in the public interest."

Upon exceptions to the Examiner's Report, the Commission, though adopting practically all the Examiner's statements of facts, reversed his findings based upon such statements and, in a sharply divided five to four opinion, found that a so-called "internal reorganization" of the debtor was impractical and approved, with some modifications, the Coast Line's proposed merger. Under this proposed merger, the debtor's equitable owners were to receive the permissible capitalization of the debtor (which was still fixed at $40,500,000),[4] in securities of the merged road of a par value of $36,375,000 and $4,125,000 cash. On the other hand, the Coast Line was to receive the

[4] The "permissible capitalization" authorized in this Third Report was most conservative. It will be recalled that in the First Report, the "permissible capitalization" was fixed roughly at $37,000,000. At that time the debtor had no real working capital and no funds to finance the railroad's rehabilitation. When this Third Report was filed, the debtor had spent millions on the improvement of its properties and still had a cash fund of $22,000,000—or cash of considerably more than one-half the previous "permissible capitalization." Despite this large amount of cash and substantial improvements in properties—one of which alone, it was estimated, would increase the debtors' normal earnings several hundreds of thousands of dollars yearly—the Commission increased the permissible capitalization of debtor but $3,500,000. Such conservative capitalization of debtor makes clearer the error of the Commission in refusing to examine the capitalization of the Coast Line in connection with its proposed "merger."

debtor's railroad free of lien, about $9,000,000 rehabilitation fund and $3,100,000 in supplies and working capital. There was no valuation of the Coast Line's properties made and no estimate of the Coast Line's normal earning capacity (which was the basis by which the debtor's permissible capitalization was fixed), and no attempt to make a fair allocation between the Coast Line's and debtor's owners of the equities in the merged properties. No provision for sharing by the debtor's bondholders in the anticipated unification savings by the debtor's bondholders was made. All real chance of such bondholders for any appreciation lay in their relatively insignificant ownership of Coast Line common stock, to be receved under the merger plan. R., Vol. I, pp. 295-391.

This Third Report of the Commission was reaffirmed upon rehearing—again in a sharply divided six-to-five report, wherein the Commission held (R., Vol. I, pp. 729-59):

(1) That the proposed plan of reorganization was valid and authorized,

(2) That there was provided in the plan "Adequacy of satisfaction of claims of first and refunding bondholders" because

(a) The "probable market value of the securities to be issued in the reorganization" was equal to or slightly more than the current market value of the defaulted First and Refunding bondholders;

(b) Since many of the First and Refunding bondholders purchased their bonds at substantial discounts and will "reap substantial profits," "that the claim will under the approved plan be adequately satisfied is obvious."

The pithy dissenting opinion is printed as an appendix hereto.

(d) Hearing on current certified plan of reorganization of debtor.

This "merger" plan of reorganization was certified by the Commission to the District Court, before which the debtor's reorganization was pending. Seasonable objec-

tions to the "merger" as a plan of reorganization were filed. Such objections came on for hearing before Honorable Samuel H. Sibley, as District Judge Designate, on January 10, 1949. Considerable testimony was offered in support of and in opposition to the fairness and equity of the proposed merger. A new plan of reorganization was proposed by St. Joe Paper Company, the fairness of which was beyond question. New evidence was submitted.

(e) Decision of the District Court disapproving certified plan.

Upon the basis of the record made before it, as well as the record certified by the Commission, the District Court disapproved the certified plan of reorganization upon three grounds:

(1) That the certified plan was illegal;
(2) That the plan was unfair and inequitable and did not afford due recognition to the rights of the bondholders.
(3) That the bondholders of the debtor should not be coerced into acceptance of the certified plan under the "cram-down" provisions of Section 77.

(f) Decision of the Circuit Court of Appeals affirming the decision of the District Court disapproving the certified plan.

Upon appeal by the Coast Line and the 5 per cent Committee, the decision of the District Court was upheld. The prevailing opinions of Judges Hutcheson and Russell concurred in sustaining the District Court's decision upon the grounds that such District Court had properly reviewed the certified plan for fairness and equity and that such Court's conclusion that the certified plan was unfair and inequitable, and did not afford due recognition to the rights of the bondholders was not clearly in error. In fact, Judges Hutcheson and Russell went farther and stated the categorical opinion that the certified plan was unfair and inequitable and did not afford due recognition of the rights of the bondholders, and joined the District Court in remanding the proceedings to the Commission

to formulate a fair and equitable plan of reorganization, just to the bondholders of the debtor.

By their petition to this Court, the petitioners seek to review and reverse those conclusions. It should be observed that this petition joins the Coast Line and its "faithful ally", the five percent committee as petitioners.

SUMMARY OF ARGUMENT

So far as this petition is concerned, and at this juncture of the proceedings, the only issues involved center upon the right of the Petitioners to appeal and upon whether the District Court had the power to review the certified plan in the manner and to the extent expressly provided by subsection (e) of Section 77 in order to determine whether such plan "is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders."

It is the position of this respondent that the Petitioners have no appealable interest and that the District Court had the power expressly given him by the statute to review the fairness and equity of the certified plan. Either fact is sufficient to deny the Petition.

ARGUMENT

A. The Petitioners have no appealable interest in the proceedings.

The right of either the Committee or the Coast Line to appeal was seriously assailed in the Circuit Court. That Court chose to pass over such question and to decide the cause on the merits. The right of the Petitioners to appeal remains in dispute on this petition and is denied by this respondent.

It is settled that "a party has an appealable interest only when his property may be diminished, his burdens increased or his rights detrimentally affected by the order sought to be reviewed by the appeal." *In re Michigan-*

Ohio Building Corp. (C.C.A. Ill. 1941) 117 F. (2d) 191, 193.

So far as the petitioner Committee is concerned, it avers in its petition that "its sole interest" in this appeal is to obtain the best possible treatment for the bondholders in whom it is interested. Page 6 of the Petition. But the "sole basis for the affirmance" of the District Court by the Court of Appeals was, as the Petition affirmatively says, its conclusion "that the Plan was not fair and equitable to the bondholders (of the Florida East Coast Railway Company) and does not afford due recognition to the rights of refunding bondholders." Page 15 of the Petition. The Circuit Court upheld the District Court's remand of the proceedings to the Commission in order that "better treatment" might be accorded bondholders (including those in whom the Committee asserts its interest) through the formulation of a new plan which Judge Hutcheson said, would be "really fair and equitable."

The effect of the order appealed from is thus to require the Commission to prepare a new plan of reorganization that will be more favorable to bondholders than the instant certified plan. How can the Committee—if it is genuinely interested in bondholders,—be aggrieved by such an Order?

It is significant that the Committee, which busies itself so about this appeal, has never consulted its *cestuis que trustent,* solicited their approval for its action or obtained a specific authorization for its action in appealing, by its own admission. And the members of the Committee own no bonds of their own.

The only justification for its right of appeal, stated by the Committee in the Petition, is that it "believes it (the certified plan) to be the best available for the many bondholders it represents." Page 6 of the Petition. The Committee does not assert that the certified plan, disapproved by the District and Circuit Courts, is the most favorable plan for bondholders that can be formulated or devised by the Commission. It limits itself to the claim that the certified plan is simply the "best available" (i. e., is the better of the two proposed before the Commission).

To sum up, the Committee has no right of appeal because the result of the orders appealed from will be "better treatment" for bondholders. It cannot be aggrieved because its bondholders will not have any of their rights diminished; such rights can only be improved. The Committee is actually seeking to appeal from a favorable decree. See *Public Service Comm. v. Brashear Lines*, 306 U. S. 204; *In re Schwartz*, 89 F. (2d) 172. Nor is the Committee authorized to file this Petition by any of those who as bondholders have any interest in this proceeding. Accordingly, the "small but faithful ally" of the Coast Line can sustain no right of appeal.

The Coast Line is equally without an appealable interest in this proceeding. On page 1 of the Petition, the Coast Line states its appealable interest in its status as the beneficiary of the proposed merger under the certified plan and as "an unsecured creditor of Florida East Coast Railway Company." Heretofore in this appeal the Coast Line has endeavored to gloss over its character of "unsecured creditor" in order to escape the scope of *Northern Pacific R. Co. v. Boyd*, 228 U. S. 482. To establish an appealable interest, however, it proclaims itself "an unsecured creditor."

But, under the certified plan, the rights of unsecured creditors are not affected. See R., Vol. I, pp. 365-72 and 744. Their rights attach only to certain disputed assets. The certified plan did not determine finally whether the assets were available for unsecured creditors. That issue was left for litigation, which has now been terminated. Whether the certified plan is approved or disapproved cannot affect this issue and the Coast Line cannot be aggrieved as an unsecured creditor by the disapproval of the certified plan, which makes no provision for unsecured creditors.

Nor has the Coast Line any standing as one of the parties to the merger contemplated by the certified plan. The Coast Line is not a bondholder; it is one who seeks to acquire the debtor on its own terms. It has submitted an offer in the form of a proposed merger. That offer has been recommended to the Court in the certified plan.

As Judge Sibley significantly remarked, "The very aggressiveness of the Coast Line in proposing and defending this plan indicates that Coast Line in proposing and defending their plan indicates that Coast Line thinks it is getting a bargain; that what it gets is not the mere equivalent of what it pays, but much more." R., Vol. II, p. —.

It has several times revised its offer to extend more favorable terms to the bondholders. During the hearing before the Examiner upon the Coast Line's proposed plan, the Coast Line modified its plan by offering to pay $3,000,000 in cash. After the Commission required additions to this, the Coast Line eagerly increased its offer. It is an eager bidder, whose bid, upon consideration by the Court, has been rejected by the Court. It has no right of appeal from such rejection. *Harduval v. Merchants & Mechanics' Trust and Savings Bank* (1920), 240 Ala. 187, 86 So. 52; *Spangelo v. North Dakota Ry. Co.* (C.C.A.N.D., 1921), 276 F. 26.

B. Theory of petition is that District Court was without power to review the unfairness of the plan.

If, however, the right of the petitioner to appeal be assumed *arguendo,* the Petition herein is without merit. The theory upon which the Petitioners ask this Court to review the decisions of the lower Courts is, basically, that those Courts erroneously held the same view "as that held by those who, prior to the decisions of this Court in the *Western Pacific* and *Milwaukee* cases, asserted that under Section 77 the Commission and the Court had coordinate jurisdiction to determine whether a plan was fair" (Brief, p. 21) and that such erroneous opinions "will not only substantially veto this Court's opinions in the *Western Pacific, Milwaukee* and *Denver* cases so far as the Fifth Circuit is concerned, but that they will cause confusion and uncertainty in other Circuits." Brief, p. 22.

The Petitioners contend by their petition that the function of the District Court, in reviewing a certified plan of reorganization under Section 77, is strictly limited to de-

termining whether the Interstate Commerce Commission "had failed to follow the statutory mandates or lacked material evidence to support its conclusions." Brief, pp. 21, 26. Beyond that function, the District Court, it is contended by the Petitioners, is vested under the statute with no authority to consider or pass on the fairness and equity of a plan of reorganization certified to it by the Interstate Commerce Commission and, most particularly, it is not permitted to exercise any "independent judgment" thereon. In short, the Court has no greater power over the certified plan of reorganization than the Circuit Court of Appeals has over decisions of the National Labor Relations Board, according to this argument of the Petitioners.

This attack by the Petitioners upon the right of the District Court to review the certified plan for unfairness and inequity presents the sole and exclusive basis for the grant of the writ sought. That was, as we have seen, the ground upon which the majority of the Circuit Court of Appeals concurred in upholding the District Court. If the District Court and the Circuit Court were correct in disapproving such plan on that ground, it is useless to consider the other and additional reasons assigned by the District Court for its disapproval. Those other and additional grounds could be availed of by the appellees upon appeal solely to sustain the decision of the District Court.

But whether correct or not, they will not support an application by the Petitioners for certiorari, for the decision of the lower Courts could be adequately sustained upon the ground asserted by the majority of the Circuit Court of Appeals. The petition herein must stand or fall upon the Petitioners' challenge to the authority of the District Court to disapprove the certified plan for unfairness and inequity, on the record.

The proper application of the "cram-down" provision of Section 77 and the relevancy of the *Old Colony* case to the legality of the certified plan, are accordingly beyond the proper scope of this application and can only become pertinent if the Petitioners have stated a ground for the writ sought on the basis of their contention that the Dis-

trict Court improperly considered the fairness of the certified plan.

C. The Dictrict Court has authority to review a plan of reorganization under Section 77 for fairness and equity.

It were well at the outset of this discussion to set apart the powers of the District Court under Section 77 over determinations of valuation and public interest by the Commission from those dealing with the general fairness and equity of the certified plan. Subsection (e) of Section 77 confers on the District Court no authority to review generally valuations and issues of public interest resolved by the Commission in reorganization proceedings. The rule urged by the Petitioners applies to such judgments of the Commission. Those determinations by the Commission, it is settled, are binding upon the Court if arrived at in accordance with the statutory standards and upon substantial evidence. So much the District Court in this cause clearly recognized. At the very outset of his opinion Judge Sibley said (R., Vol. II, pp. 474-5):

> "I have no function to review the matter of compatibility with the public interest of the plan, or the valuation of the property involved unless on the question of unconstitutional taking of it; but I should independently consider those matters which the statute requires me to be satisfied about."

It may be helpful, also, to ascertain the accepted definition of valuation within the contemplation of the foregoing rule. In its Fourth Report in this proceeding, the Commission said: "Value for reorganization purposes, physical value, and market value, are each entirely different, *and we can concern ourselves only with the first*" (italics added). R., Vol. I, p. 736. The term "value for reorganization purposes" which the Commission has said was the only valuation made by it and with which it could be solely concerned in this proceeding, was given this fixed meaning by the Commission: "In any reorganization 'value for reorganization purposes' simply means 'maxi-

mum permissible capitalization' ". R., Vol. I, p. 735. Accordingly, the "maximum permissible capitalization" of the debtor and the public interest involved in debtor's operations are reviewable by the District Court only for observance of legal standards and for substantial evidence.

But, unlike its provisions with respect to permissible capitalization and public interest, Section 77 is not silent upon the power of the District Court over the fairness and equity of the certified plan. On the contrary, it speaks out with both clarity and directness in what Judge Hutcheson so aptly described as "plain and unambiguous language." The Petitioners themselves conceded in their brief filed in the Circuit Court in this case that the District Court had full power to review the fairness of a certified reorganization plan under the plain language of the statute, for the Coast Line argued at page 173 of its brief in that Court that the District Judge had erred in "concluding that the statutory provisions (giving the District Court authority to review the fairness of the plan) were to be followed as written."

This admission that the plain language of the statute vests the District Court with authority to review the fairness of the certified plan is demanded by the unqualified words of subsection (e) of Section 77. This subsection requires the District Court, preliminary to approval of the certified plan, to satisfy itself that the certified plan "is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders and does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders." No support for the appellants' argument is thus to be found in the statute itself. On the contrary, the statute contradicts their argument. So much they admit for, in fact, their argument rests, as we have seen, largely upon the contention that the statute has been construed and is to be construed in contradiction of its plain import.

Actually, the Interstate Commerce Commission assumes for itself none of the broad powers asserted for it by the

Petitioners and seemingly recognizes that the District Court has the authority to review the fairness and equity of a certified plan of reorganization under Section 77. The dissenting opinion filed in connection with the Fourth Report of the Commission herein was written by Commissioner Mahaffie, for years the head of the Finance Division of the Commission, who, along with Commissioner Eastman, sponsored the enactment of the railroad reorganization statutes (often spoken of as the "Mahaffie Acts"). In that dissenting opinion, filed on behalf of five members of the Commission, Commissioner Mahaffie said (R., Vol. I, p. 747): "It should be remembered that the 'fair and equitable' finding is required to be made not only by us but also by the court." Beyond question, this quotation shows that Commissioner Mahaffie and those commissioners joining with him recognized that the District Court had full "concurrent" power to review the certified plan for fairness and equity, and had the right to exercise an independent judgment on such issues. To that statement by Commissioner Mahaffie, the majority opinion of the Commission took no exception. It seems fair to assume then that it accepted Commissioner Mahaffie's construction of the District Court's power.

Nor can the appellants justify their proposed construction of the statute by reference to the legislative history. The legislative history of Section 77, as it deals with the respective functions of the Commission and the Courts in reviewing plans of reorganization thereunder, was carefully detailed by Mr. Justice Reed in his able opinion in *Ecker v. Western Pacific Ry. Co.*, 318 U. S. 448, at pages 469 to 475, inclusive. Preleminarily, he marked out the restrictions under the District Court's jurisdiction over the Commission's determinations of permissible capitalization and public interest. He then passed on to the District Court's power under the language of subsection (e) to review the equity of a certified plan. After referring to the failure of the House in its 1933 version of Section 77 to include a provision for judicial review of the fairness and equity of plans of reorganization, Mr. Justice Reed emphasized the subsequent Senate amendment endowing the

Courts with a "concurrent" right with the Commission to review independently the fairness and equity of the plan of reorganization, saying (p. 470):

> "These amendments giving *concurrent power to the Court* were adopted by the Senate and accepted by the House and the bill became the Act of March 3, 1933, 47 Stat. 1475." (Italics added.)

Mr. Justice Reed then turned to the amendments of 1935 and put the matter thus (p. 471):

> "While the most important amendment was to furnish means to avoid the obstruction of dissatisfied classes of creditors or stockholders by making a fair and equitable plan effective over dissenters, the requirements of coordinated action by Commission and Court was retained."

This legislative history, so painstakingly reviewed by Mr. Justice Reed, shows that it was the plain purpose of the Congress that the District Court should have the power of independent review of the fairness and equity of the certified plan under Section 77.

Nor do the decisions in the *Western Pacific* (318 U. S. 448) or the *Milwaukee* cases (318 U. S. 523), upon which the appellants wholly rely, violate this legislative history or the "clear and unambiguous language" of the statute or Commissioner Mahaffie's administrative interpretation with respect to the power of the District Court to review the fairness of the certified plan.

In the *Western Pacific* case, the District Court, after remarking on the limited right of review exercised by the District Court in that reorganization over the "permissible capitalization" of the debtor and over public interest fixed by the Commission, said (p. 467, 318 U. S.):

> "*Upon the other findings of the Commission, the District Court exercised an independent judgment* based upon the record and the findings of the Commission, together with additional evidence produced before the Court by the parties." (Italics added.)

The action of the District Court in exercising in that case "an independent judgment upon all" findings of the Commission other than those of valuation and public interest was thus approved by this Court in the *Western Pacific* case, as shown by the quoted sentence. The *Western Pacific* case represents an unqualified approval of the right of the District Court to review independently the conclusions of the Commission on the fairness of a certified plan of reorganization. That was just what the lower Courts did in this case. It cannot, then, be said fairly that the decisions of the lower Courts in this case "veto" or violate the conclusions reached by the Court in the *Western Pacific* case.

That the decisions of the District Court in this case conformed with the rule announced in the *Western Pacific* case is similarly established by reference to the District Court's opinion in the *Western Pacific* case, which was approved by the Supreme Court. There the District Court summed up the respective functions of Court and Commission in these words (34 F. Supp. 493 at p. 504):

> "The two issues of (1) amount and character of capitalization and (2) distribution of new securities are closely related. The determination of the amount and character of the capitalization (a legislative function affecting the public interest) is exclusively within the province of the Commission. The only qualification, if any, is that the Court shall independently determine whether, in the exercise of its jurisdiction, the Commission has acted fairly, within the bounds of the Constitution and not arbitrarily. The determination of the questions relating to the distribution of the new securities, including legal priorities and allocations, involves private rights and is a judicial function, within the province of the court. . . . While the decision of the Commission in the premises is advisory only, it was of inestimable value to the Court in enabling it to see the whole picture and arrive at a decision."

To summarize, this District Court decision, which was upheld by this Court, held that the permissible capitalizaton of the debtor, and the public interest, were within

the special province of the Commission, to be reviewed by the Court for want of material evidence or failure to observe the statutory standards, but in all other fields, such as the equitable equivalence of the securities offered,—in short, the balancing of all "private rights" along lines of fairness and equity in the allocation of securities,—the findings of the Commission are "only advisory" to the Court, which should and will exercise its independent judgment.

The *Milwaukee* case with equal clearness supports the conclusion reached by Judge Sibley on his jurisdiction to exercise an "independent judgment" on the fairness and equity of the certified plan. In that case, Mr. Justice Douglas, after an extensive independent review of the adequacy of the treatment of the general mortgage bondholders—in large part, one of the basic issues presented to Judge Sibley in this case—, remanded the cause to the District Court, saying (p. 571, 318 U. S.):

> "*The Commission and the District Court should determine* what the general mortgage bonds should receive in addition to a face amount of inferior securities equal to the face amount of their old ones, as equitable compensation, qualitative or quantitative, for the loss of their senior rights." (Italics added.)

In determining the adequacy of a creditor's treatment, "equitable equivalence" and like questions, it will be noted that the Court "brigaded" (*Palmer v. Mass.*, 308 U. S. 79 at p. 87) the Commission and District Court, treating them as having "concurrent" and "coordinate" jurisdiction, charged, each obedient to its own procedure and in accord with its own judgment, to pass on the issue. Certainly this language from the *Milwaukee* case does not indicate that the role of the Court under Section 77 in dealing with the fairness and equity of a certified plan is that of a "rubber stamp" any more than it is that of "a ministerial register of the vote of the several classes of security holders" under old Section 77b. See *Case v. Los Angeles Lumber Products Co.*, 308 U. S. 106 at p. 114. It clearly shows that the District Court is expected to exer-

cise an "independent judgment" on the fairness and equity of the certified plan.

The Petitioners, in their brief, quote from Mr. Justice Douglas' opinion in this *Milwaukee* case. P. 17, Petitioners' Brief. The point of such quotation for their argument is not clear. If the purpose was to throw light on the judicial functions in railroad reorganization, it is singular that Petitioners omitted the succeeding sentences which dealt specifically with this question. To fill out the quotation, Mr. Justice Douglas said at pages 565-6, 318 U. S.:

> "It is sufficient that each security holder in the order of his priority receives from that which is available for the satisfaction of his claim the equitable equivalent of the rights surrendered. That requires a comparison of the new securities allotted to him with the old securities which he exchanges to determine whether the new are the equitable equivalent of the old. But that determination cannot be made by the use of any mathematical formula. *Whether in a given case senior creditors have been made whole or received 'full compensatory treatment' rests in the informed judgment of the Commission and the District Court on consideration of all relevant facts.*" (Italics added.)

The *Milwaukee* case as the above quotation so clearly shows, contemplates that the Court, equally with the Commission, shall exercise an independent and coordinate jurisdiction to determine the fairness and equity of the certified plan and to determine whether bondholders have received "full compensatory treatment." The decisions of the lower Courts in this proceeding followed with exactitude that rule.

That this construction of the *Western Pacific* and *Milwaukee* cases, which we have outlined, is the proper one seems settled by the language of this Court in *Comstock v. Group of Investors,* 335 U. S., 211, where Mr. Justice Jackson, speaking for a majority of the Court, said (pp. 226-7):

> "We think that, in the reorganization proceedings,

the courts may entertain on their merits objections to a plan even if made by one who might be barred from asserting a cause of action in his own behalf, if the subject-matter of the objections is such that it goes beyond the objector's individual interests and affects the fairness and equity of the plan. . . .

"In view of the functions cast upon the court in such cases, we cannot say that it may not, in its discretion, consider objections on their merits even though they have not been presented to the Commission. Some circumstances might be disclosed to indicate a remand for their consideration by the Commission. They might indicate that the courts would withhold approval, not out of deference to the objecting parties' rights but because of the broad responsibilities laid upon the court for the equity and fairness of the plan as a whole."

Re Chicago, R. I. & Pac. Ry. Co. (D. C. Ill., 1943) 50 F. Supp. 835, represents an application of the rules enumerated in the *Western Pacific* and *Milwaukee* cases on the respective powers of Commission and Court. Leading counsel for the Coast Line represented the Protective Committee for the general mortgage bonds of the debtor in that case. He vigorously assailed the Commission's finding that the bondholders represented by him were receiving "full satisfaction" under the certified plan. See page 855, 50 F. Supp. He asked the Court, in the exercise of its independent judgment, "to determine whether the senior issue has received 'full compensatory treatment'." Page 856, 50 F. Supp. And the Court accepted counsel's construction of its powers, observing, "Assuming this statement to be a specific finding of full satisfaction, or full compensatory treatment, *it remains for the court to determine whether the Commission was correct on this point.*" Page 856, 50 F. Supp.

And the Court proceeded to find that there was not "full satisfaction," "equitable equivalence," "full compensatory treatment," because, while the senior creditors were given securities of the par value of their full debt with interest, the actual value of such securities was less

than the full amount of their debt with interest and junior creditors could not accordingly take. Page 856, 50 F. Supp.

In reality, the Petitioners acted, during the proceedings before the District Court, upon the assumption that the District Court was charged with an independent responsibility for the fairness and equity of the certified plan. They did not assume that the District Court was precluded from inquiring into such fairness by the conclusions of the Commission. They called as a witness before the District Judge, Mr. Stott, a statistical employee of J. P. Morgan & Company, filling in as the "acting Secretary" of the petitioner Committee. Mr. Stott restated the estimate of income return from the securities to be distributed among the debtor's bondholders under the certified plan incorporated in the report of the Commission and, on the basis of such estimates, gave his reasons for concluding that the certified plan was fair and equitable. If the District Court had no right to review the fairness and equity of the certified plan, why did the petitioners call Mr. Stott as a witness and offer his testimony on the fairness of such plan?

And, as Judge Sibley sagely remarked, for that matter, why would the Act permit the District Court to receive such evidence as that of Mr. Stott, if that Act did not intend that the District Court should review the fairness of the plan?

Counsel for the Petitioners seeks to gather authority for their position from this single sentence, detached from its context, in the first opinion in the *Denver and Rio Grande Reorganization*, 328 U. S. 495 at p. 509:

> "To the courts, Congress confided the power to review the plan to determine whether the Commission has followed the statutory mandates of subsection (e) 318 U. S. at page 477, 63 S. Ct. page 709, 87 L. Ed. 892, and whether the Commission had material evidence to support its conclusions. 318 U. S. at page 477, concurring opinion at page 512, 63 S. Ct. at page 709, concurring opinion at 725, 87 L. Ed. 892."

This quoted language, as the citation set forth therein evidences, dealt with the Court's power in connection with

the valuation, i. e., permissible capitalization, of the debtor's property. Page 477 of 318 U. S., to which the quoted excerpt refers, is restricted to a discussion of the reviewability of the valuation of the debtor made by the Commission. In fact, it is headed, "Method of Valuation." The Court's discussion of the respective powers of Commission and Courts, on the other hand, appears on pages 471-4 of the cited opinion. This quotation is without application to the District Court's power to review a plan for fairness and equity; it is limited to the problem of valuation or permissible capitalization.

Petitioners, also, would bulwark their argument with *Securities and Exchange Commission v. Central Illinois Securities Corp.*, 69 S. Ct. 1377. It must be noted that the issue of reviewability of administrative determinations under the Public Utility Holding Company Act of 1935 in this case turned upon the clear conflict between the scope of judicial review provided in the case of voluntary plans submitted by the holding company and that authorized for plans imposed by the Commission. In the latter case the reviewing court was bound by all factual findings by the Commission, if supported by material evidence; in the former case no such limit on judicial power was expressly included in the statute. The determination made by the Commission, around which the appeal revolved, dealt with valuations. The lower Court set aside such valuations, assuming that since this was a plan submitted by the holding company, it had the power to reverse the Commission conclusions for "colloquial equities."

What the Court held was that the two provisions for review under the Act—both the one covering voluntary and involuntary plans—were to be harmonized and that both reviews should be subject to the same limitations, a ruling which meant that the valuations made by the Commission, if supported by material evidence, were binding upon the reviewing court. Such a ruling the Court held was not an unusual conclusion and instanced, in support of such statement, the rule in the *Western Pacific* case, saying (Page 1393, 69 S. Ct.):

"The Commission's findings as to valuation, which

> are based upon judgment and prediction, as well as upon 'facts', like the valuation findings of the Interstate Commerce Commission in reorganization under 877 of the Bankruptcy Act, *Ecker v. Western Pacific R. R. Corp., supra,* are not subject to reexamination by the court unless they are not supported by substantial evidence or were not arrived at 'in accordance with legal standards'."

And the language of the Court on "colloquial equities" is (p. 1406, 69 S. Ct.):

> "In deciding the case on the assumption that 'the inquiry is one of relative rights based on colloquial equity' and that the Otis case accorded participation to security holders in accordance with the standard of colloquial equity, the District Court erred insofar as by 'colloquial equity' it meant considerations which do not bear upon the investment or going-concern value the preferred would have absent the liquidation compelled by the Act."

It is clear from the foregoing that the Court did not disapprove of "colloquial equities" generally; it disapproved as irrelevant to the particular inquiry the specific "colloquial equities" envisaged by the lower Courts. This case dealt with a problem of statutory construction; it was not concerned with the broad range of judicial power imposed by subsection (e) of Section 77.

To summarize the conclusions of the cases reviewed, the powers of Commission and Court, in reviewing plans of reorganization under Section 77, are:

> (1) In the fields of public interest and valuation, the Commission acts independently of the Courts, which have power only to review as to such determinations for failure to follow legal standards and for absence of material evidence. As the Court said at page 473, 318 U. S.: "None of the findings required of the judge under subsection (e) relate specifically to valuation," and we may add, public interest.
>
> (2) In all other fields, including the broad equity and fairness of the plan as a whole, the Courts have, by

> express delegation under subsection (e) of the Act, "coordinate" and "concurrent" jurisdiction with the Commission, though, "As to these," the powers of the Court "are negative. It may veto the plan in its entirety but may improve it only by suggestion. It becomes a necessary and important factor in railroad reorganization. These reorganizations may be attained only through properly coordinated action between the Commission and the Court." 318 U. S. 474-5.

It follows from the foregoing rules that the District Court had both the power and the duty to determine the fairness and equity of the certified plan and whether such plan afforded due recognition to the rights of the bondholders. It had before it concededly an ample record on which to base such determinations. It so determined the issues adversely to the certified plan. Its decision was both approved and reaffirmed upon appeal to the Circuit Court, which held that the certified plan was not fair and equitable and did not afford due recognition to the rights of the bondholders. Such determination, so upheld by the Circuit Court, should not be disturbed by this Court. In the *Milwaukee Case* (318 U. S. 523 at p. 564) Mr. Justice Douglas said:

> "But we are not performing the functions of the District Court under S. 77 (e). Our role on review is a limited one. It is not enough to reverse the District Court that we might have appraised the facts somewhat differently. If there is warrant for the action of the District Court, our task on review is at an end."

This issue of the fairness and equity of the certified plan is one of fact. Such issue has been resolved by unequivocal concurrent findings of fact by the two lower Courts. That concurrent determination will not ordinarily be disturbed. As this Court said in *Geddes v. Anaconda Copper Mining Co.* 254 U. S. 590:

> "With this conclusion we agree, applying the settled rule of this Court that in suits in equity concurrent findings by two courts on a question of fact will be

accepted unless it be clear that their conclusion is erroneous."

The Petitioners do not argue that the District Court did not have a factual basis for its determination; it rested its petition upon the legal ground that the District Court was without power to review the fairness and equity of the certified plan. It is thus conceded that there is warrant in the record for the District Court's determination. Accordingly, to use the language of Mr. Justice Douglas, the task of this Court "on review is at an end" and the petitions should be denied.

Respectfully submitted,

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APPENDIX A

The dissenting opinion as to the Fourth Report of the Interstate Commerce Commission is as follows (R., Vol. I, pp. 745-7):

> "Here the Atlantic Coast Line is an applicant seeking to acquire the railroad property being reorganized. It is certainly in no more favored position than would be the holder of a junior claim or a stockholder. The creditors under the plan now approved receive much less 'in value than the face of their claims.' The report relies on the theory that the creditors are entitled to receive only the equivalent of the face amount of reorganization securities as fixed by us, which equivalent may be, and in this instance is, very much less in market value than either the face of the claims or the value of the property for reorganization purposes as found by this Commission. The latter figure is $40,500,000. This is based on the Commission's estimate of normal future earnings and is sometimes described as the capitalizable value of the property. The effect of the finding is that securities of that total amount may properly be issued in the reorganization. The report attributes to the Coast Line securities to be paid for the property a value of approximately $31,000,000. The question presented is whether the persons who normally would be entitled to receive the $40,500,000 of securities found by us to be properly issuable, and the resulting control of the property, may be required to give up that control and to accept instead Atlantic Coast Line securities having a value much less than that amount. On this point the holding of the Supreme Court in the Boyd case, supra, is of interest:
>
> > 'If the value of the road justified the issuance of stock in exchange for old shares, the creditors were entitled to the benefit of that value, whether it was present or prospective, for dividends or only for purposes of control. In either event it was a right of property out of which the creditors were entitled to be paid before the sotckholders could retain it for any purpose whatever.' (Page 508.)

The Boyd principle is the authoritative test of what is fair and equitable. It is difficult to see how it can be subordinated, as seems to be done in the report, to the Commission's finding of what is required by the public interest. *It should be remembered that the 'fair and equitable' finding is required to be made not only by us but also by the Court.* Apparently to buttress the public interest finding the report adopts a novel theory as to what treatment legally satisfies a prior claim. After discussing at some length the prices paid by some of the security holders for some of their holdings and their possible profits on such holdings, the conclusion is reached that 'the preponderance of the creditors, instead of suffering losses, will reap substantial profits.' It is then found 'That the claim of the First and Refunding bondholders will, under the approved plan, be adequately satisfied is obvious.' This remarkable finding seems to be based on an appendix attached to the summary of the argument of counsel for the Coast Line. It is not of record in this proceeding. And even if the facts stated in it were proven they would not afford a valid basis for the finding above set out." (Italics added.)